

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CECELIA J. PATEE)	
Claimant)	
VS.)	
)	Docket No. 160,948
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On March 20, 1997, the applications of the respondent and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Nelsonna Potts Barnes on September 24, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, John C. Nodgaard of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Garry L. Howard of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of the claimant's injury and/or disability?
- (2) Was the surgery of September 16, 1994, performed by Dr. Michael P. Estivo authorized medical treatment?
- (3) Is claimant entitled to temporary total disability compensation subsequent to the September 16, 1994, surgery?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a 44-year-old high school graduate, began working for respondent in September 1979, as a sheet metal assembler. She last worked for respondent on September 6, 1991. Claimant's duties as a sheet metal assembler required her to do riveting, use bucking bars, operate drill motors, and perform heavy lifting. This was considered a major assembly job and required repetitive use of claimant's hands and arms. Claimant worked in this occupation for approximately seven years. During her employment with respondent, claimant suffered several injuries to her upper extremities. Claimant testified she left her employment on September 5, 1991, because she was suffering "swelling and stuff in my arm." Subsequent to her injury, claimant was treated by several doctors. On her own, she went to Dr. J. Stanley Jones about the problems in her left hand and arm. Dr. Jones treated claimant from September 1991 through November 25, 1992. Claimant was also examined or treated at various times by Dr. Robert A. Rawcliffe, Jr., Dr. Earnest R. Schlachter, Dr. Paul Stein, Dr. Lawrence R. Blaty and Dr. Michael Estivo, all of whom provided various impairment ratings and work restrictions dealing with various problems in claimant's upper extremities.

Dr. Jones did not give claimant an impairment rating but at his deposition he opined that lateral epicondylitis resulted in a 5 to 12 percent impairment of function. Dr. Rawcliffe found claimant to have a 10 percent permanent functional impairment of the left upper extremity as a result of her carpal tunnel and a 5 percent functional impairment of the left upper extremity as a result of the lateral epicondylitis. Dr. Rawcliffe also diagnosed significant degenerative disc disease in claimant's cervical spine and found claimant had a 7 percent impairment to the body as a whole as a result of that condition. Dr. Blaty opined that claimant had a 9 percent permanent impairment of function to the body as a whole for her cervical involvement and Dr. Schlachter found claimant had a 10 percent

impairment to the body as a whole as a result of problems in her cervical spine, a 10 percent impairment of function to her left upper extremity which converts to a 6 percent impairment to the body which, when combined, equates to a 15 percent whole body impairment on a functional basis.

Dr. Estivo opined claimant had a 30 percent permanent partial impairment to the body as a whole as a result of the C5-6 and C6-7 herniated discs and subsequent surgery but admitted on cross-examination that, if utilizing the AMA Guides, it would have equated to a 9 percent whole body functional impairment.

The Appeals Board in reviewing the various medical opinions, finds claimant has suffered a 16 percent permanent partial impairment of function to the body as a whole as a result of the injuries suffered while employed with respondent.

The Administrative Law Judge also found claimant entitled to a work disability. Respondent contends claimant has forfeited her right to a work disability due to her refusal to return to accommodated work which was offered by respondent on more than one occasion. Respondent cites as support for its argument, Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), 257 Kan. 1091 rev. denied (1995). In Foulk the Court of Appeals declared that the Workers Compensation Act could not be construed to award benefits to a worker solely for refusing a proper job the worker had the ability to perform.

In this instance, evidence has been presented to indicate respondent, on several occasions attempted to return claimant to work at an accommodated position. The claimant regularly refused this accommodated employment expressing concern over her inability to return to work as a sheet metal assembler. Respondent's representative, Mr. Robert W. Schleiger, testified that claimant was offered employment within her restrictions in writing on May 23, 1994. In his deposition of October 12, 1995, Mr. Schleiger verified that this offer of employment remained open and that the restrictions placed upon claimant by the various doctors could be met in the same department claimant had previously worked. Claimant's concern that she would be returned to work as a sheet metal assembler is contradicted by the testimony of Mr. Schleiger who testified that there are over 300 separate jobs in the sheet metal assemble department, many of which do not require repetitive use of the upper extremities or use of the various vibrating tools which originally caused claimant problems.

Although respondent tried on many occasions to return claimant to work, claimant never reported to personnel when instructed and has never attempted to return to any type of accommodated employment at Boeing.

The Appeals Board finds, based upon the evidence in the record, that claimant has refused accommodated employment within her physical restrictions and should not be allowed to benefit for refusing proper jobs which claimant has the ability to perform. As

such, the Appeals Board finds, based upon the logic contained in Foulk, that claimant is entitled to the functional impairment as a result of the injury suffered with respondent.

Claimant underwent cervical surgery under the hands of Dr. Michael Estivo on September 16, 1994. Dr. Estivo was not authorized to perform this surgery by respondent and no request has been made to authorize Dr. Estivo for this surgery. Claimant did request the Administrative Law Judge to order the respondent to pay for the surgery once the surgery had been completed. K.S.A. 44-510 (Ensley) states:

"(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury."

K.S.A. 44-510(c) (Ensley) states in part:

"If the services of the health care provider furnished as provided in subsection (a) are not satisfactory to the injured employee, the director may authorize the appointment of some other health care provider subject to the limitations set forth in this section and the rules and regulations adopted by the director. Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total of \$350."

A specific procedure is set forth within the Workers Compensation Act for the employee to obtain different health care treatment should the health care provider furnished by the respondent prove to be unsatisfactory. In this instance the respondent had provided several health care providers as treating physicians for claimant. Nevertheless, claimant elected to obtain surgery from a health care provider who was clearly unauthorized and who was never requested to be made authorized. As such, the Appeals Board finds that the treatment provided by Dr. Estivo, including the surgery of September 16, 1994, shall constitute unauthorized medical treatment and the respondent shall be responsible for up to \$350 of the total cost upon presentation of an itemized statement verifying same.

The Appeals Board must next decide whether claimant is entitled to temporary total disability compensation subsequent to the surgery.

While the surgery performed by Dr. Estivo was unauthorized, at least two doctors, authorized by the respondent, indicated the surgery to claimant's cervical spine would be an appropriate treatment under the circumstances. As such, the Appeals Board finds the surgery provided, while unauthorized, nevertheless would entitle claimant temporary total

disability compensation during claimant's recovery period. As such, claimant is entitled to temporary total disability compensation to be paid by respondent from September 16, 1994 through claimant's release date of June 16, 1995. As respondent paid temporary total disability compensation through July 5, 1995, this represents an overpayment of three weeks of temporary total disability compensation.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award of compensation is hereby made in favor of the claimant, Cecelia J. Patee and against the respondent, Boeing Company and its insurance carrier Aetna Casualty & Surety Company for an accidental injury occurring through September 5, 1991.

Claimant is entitled to 147 weeks temporary total disability compensation at the rate of \$289 per week totaling \$42,483 followed by 268 weeks permanent partial disability compensation at the rate \$83.17 totaling \$22,289.56 for a total award of \$64,772.56.

As of April 18, 1997, claimant would be entitled to 147 weeks temporary total disability compensation at the rate \$289 per week totaling \$42,483, followed thereafter by 146.14 weeks permanent partial disability compensation at the rate of \$83.17 per week for a total of \$54,637.46, which ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant would be entitled to 121.86 weeks permanent partial disability compensation at the rate of \$83.17 per week totaling \$10,135.10 until further paid or until further order of the director.

In all other regards, the Award of the Administrative Law Judge is affirmed in so far as it is not in contravention to the opinions expressed herein.

The fees necessary to defray the expense of the Administration of the Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund with the Fund responsible for 80 percent of the fees and the respondent responsible for 20 percent of the fees per the agreement of the parties, to be paid as follows:

Deposition Services

Deposition of Jerry D. Hardin	\$302.00
Deposition of Ernest R. Schlachter, M.D.	\$172.00
Deposition of Robert A. Rawcliffe, M.D.	\$267.40
Deposition of Lawrence R. Blaty, M.D.	\$260.80
Deposition of Robert W. Schleiger	\$211.20
Deposition of Maurice Entwistle	\$223.40
Deposition of Paul Stein	\$ 79.60

Barber & Associates	
Transcript of regular hearing	\$255.95
Deposition of Jay s. Jones, M.D.	\$180.00
Don K. Smith & Associates	
Transcript of preliminary hearing	\$136.75
Deposition of Michael P. Estivo, D. O.	\$226.00

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Wichita, KS
Vaughn Burkholder, Wichita, KS
Garry L. Howard, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director